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SUPREME COURT, U.S.

NO. 82-5183

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

LARRY EUGENE EVANS,

PETITIONER,

-vs-

ELLIS C. MacDOUGALL, Director of Arizona Department of Corrections, and ROBERT ZORN, Warden of Cell Block Six, Arizona State Prison, Florence, Arizona,

RESPONDENTS,

and

THE ATTORNEY GENERAL OF THE STATE OF ARIZONA,

ADDITIONAL RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Ninth Circuit Court of Appeals properly remand this case to the state courts to allow petitioner to exhaust his state remedies on the issue whether he received fair notice with regard to the state's seeking the death penalty?

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STATEMENT OF THE CASE

Petitioner filed a petition for a writ of habeas corpus in the United States District Court for the District of Arizona, alleging in essence that the State of Arizona failed to give him fair notice with regard to its intent to seek the death penalty. The district court denied petitioner's petition. Petitioner then appealed to the Ninth Circuit Court of Appeals. While this appeal was pending, the Arizona Supreme Court handed down its decision in State v. Ortiz, 131 Ariz. 195, 639 P.2d 1020 (1982), which decision specified the due-process fair-notice requirements that the state must give a defendant with regard to its seeking the death penalty. Because the record presently before the circuit court does not reflect whether these requirements were satisfied in this case, the state moved to remand this case to the state courts to permit the exhaustion of state remedies on this point. The circuit court granted this motion. Petitioner in the instant action seeks to challenge this decision of the circuit court.

ARGUMENT

THE CIRCUIT COURT PROPERLY REMANDED THIS CASE TO THE STATE COURTS TO PERMIT THE EXHAUSTION OF STATE REMEDIES.

Petitioner's contention must be that the Ninth Circuit Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision."

Rule 17(1)(a), Rules of the Supreme Court. Respondent disagrees that this standard has been satisfied. It is respondent's position that the court of appeals acted properly in remanding this case to the state courts to allow petitioner to exhaust his state remedies on the issue whether he had sufficient due-process notice under State v. Ortiz, 131 Ariz. 195, 639 P.2d 1020 (1982).

Petitioner's contention has been that the state was obliged to allege before trial the aggravating circumstance upon which it would be seeking the death penalty, and further that it was obliged to prove this aggravating circumstance to the jury. Petitioner has argued that both due process and equal protection required this result. It is clear that petitioner has exhausted his state remedies regarding this specific contention.

However, there has been no exhaustion of state remedies on the closely related contention whether under State v. Ortiz, supra, petitioner received fair notice. In State v. Ortiz, the Arizona Supreme Court stated:

> [D]ue process in an A.R.S. § 13-703 hearing requires of the prosecution three duties: (1) disclosure of the aggravating circumstances the state will seek to prove; (2) disclosure of the evidence the state will use; and (3) disclosure sufficiently in advance of the hearing that the defendant will have a reasonable opportunity to prepare rebuttal.

131 Ariz. at 207, 639 P.2d at 1032. State v. Ortiz was handed down while petitioner's appeal was pending in the circuit court. The record before the circuit court did not

reflect whether these due-process fair-notice requirments of State v. Ortiz had been met in this case. Thus, there is a need to remand this case to the state courts to determine whether these requirements were satisfied.

Petitioner has cited Francisco v. Gathright, 419 U.S. 59 (1974), and Roberts v. LaValle, 389 U.S. 40 (1967), in support of his argument that the circuit court should not have remanded this case to the state courts. But these two cases are easily distinguishable from our case. In both of the cases cited by petitioner, there simply was no need to remand the case to the state courts. In both cases, the circuit court was faced with a purely legal question whether a state statute was unconstitutional. The circuit court could itself pass judgment on the statute despite a previous state court decision holding it to be unconstitutional. In the instant case, there is a definite need for a remand of the case to the state courts. As the instant case now stands, there is no factual predicate in the record sufficient for determining whether petitioner had fair notice with respect to the state's seeking the death penalty. Also, State v. Ortiz is not necessarily supportive of petitioner's claim, since it may well be that the fair-notice requirements specified in that case were met in our case.

CONCLUSION

Because the circuit court properly remanded this case to the state courts to allow for exhaustion of state remedies regarding one of the issues presented, this Court should deny the petition for a writ of habeas corpus.

Respectfully submitted,

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AFFIDAVIT

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

GREG A. McCARTHY, being first duly sworn upon oath, deposes and says:

That he served appellant in the foregoing case by forwarding one (1) copy of RESPONSE TO PETITION FOR WRIT OF CERTIORARI; and also served the attorneys for the appellant in the foregoing case by forwarding one (2) copies of RESPONSE TO PETITION FOR WRIT OF CERTIORARI, in a sealed envelope, first class postage prepaid, and deposited same in the United States mail, addressed to:

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LARRY EUGENE EVANS
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RANDALL J. KRIES
2715 N. 3rd Street, Ste. 100
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this 27th day of August, 1982.

GMcCarthy
GREG A. McCARTHY

SUBSCRIBED AND SWORN to before me this 27th day of August, 1982.

Erica L. Pike
NOTARY PUBLIC

My Commission Expires:
October 28, 1985

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